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Public Utilities Commission  
Attn: Patricia Van Gerpen, Executive Director  
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**RE: IN THE MATTER OF THE APPLICATION BY SCS CARBON TRANSPORT, LLC FOR A PERMIT TO CONSTRUCT A CARBON DIOXIDE TRANSMISSION PIPELINE. – Scheduling Response**  
**PUC Docket: HP22-001**  
MAGT File: 0515

Dear Ms. Van Gerpen:

There are a number of pending motions and activities in this docket regarding scheduling which seem to beg a comment or response. Some of them are legal, some are practical, all seem to be a bit complicated. Applicant objects to any schedule which does not result in a decision and complete findings by June 15, 2023, as found in the Applicant's Motion to Extend Deadline to June 15, 2023.

Statute requires the Commission to “make complete findings in rendering a decision” and do so “within twelve months of receipt of the initial application.” The Commission has always and routinely done so, to my understanding, in dockets as complex or more so than this one. Additionally, the Commission has heard such cases in evidentiary hearings of less than two weeks’ time. In Applicant’s view the Commission’s application of the following statutes are at the heart of the scheduling matter:

**49-41B-24. Permit for energy conversion facilities, AC/DC conversion facilities, or transmission facilities--Complete findings by commission required within year of application.**

Within twelve months of receipt of the initial application for a permit for the construction of energy conversion facilities, AC/DC conversion facilities, or transmission facilities, the commission shall make complete findings in rendering a decision regarding whether a permit should be granted, denied, or granted upon such terms, conditions or modifications of the construction, operation, or maintenance as the commission deems appropriate.

**Source:** SL 1977, ch 390, § 18; SL 1980, ch 328, § 2; SL 1981, ch 341; SL 2006, ch 242, § 5; SL 2009, ch 243, § 3; SL 2015, ch 235, § 2.

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**49-41B-24.1. Extension of deadlines.**

Upon request of the applicant, the commission may extend the deadlines for commission action established in §§ 49-41B-24 and 49-41B-25.

**Source:** SL 2019, ch 200, § 10.

For a short time now, relatively speaking, the existence of Section 24.1 has allowed the Applicant, and only the Applicant, to request an extension of the twelve-month statutory deadline in Section 24. In this docket the Applicant did so on May 9, 2022, moving to extend the docket deadline to a date certain, June 15, 2023. That was the Applicant's request, which motion was considered by the Commission and an Order issued June 13, 2022 extending the deadline for action, "Indefinitely."

That action to extend the deadline indefinitely was not pursuant to the motion of the Applicant and thus the Commission had no authority under statute to make such an Order. The Commission's action was not only an intensely strong disincentive for any later applicant to make such a motion, it destroyed the intention of the statute. The intent of the statute is to keep control of the date for the decision in the Applicant's hands, not to transfer it to the Commission in the form of a blank calendar. If the Commission were to have that power, the Legislature would have said so clearly. It did not.

In fact, the Commission's own staff carefully considered the limitations of what the Commission (or others) can or cannot do in regards to a request for extension under Section 24.1 in their filing June 1, 2022. In the motion, staff highlighted ARSD 20:10:01:14, which allows the Commission to grant extensions of time upon request of a party, in particular. However, staff explained the Commission's own administrative rules "cannot be read to supersede limitations placed on the commission itself" and that "nothing in" SDCL 49-1-11, the statute ARSD 20:10:01:14 implements, "relates to statutory deadlines placed on the Commission [such as those in Sections 24 or 24.1]." Staff further noted the "only allowance" the Legislature gave to extend the twelve-month deadline is vested in the Applicant, not the Commission. Any other result, staff explained, would "grant [the Commission] more authority than the plain language of the statutes." Ultimately, staff reached the same conclusion the Applicant has: "[T]he Commission lacks the authority to grant an extension beyond the twelve-month deadline upon its own motion or upon the request of any party other than SCS Carbon."

Applicant, while dismayed by the Commission's Order, made no objection at the time, noting that there was sufficient time for the Commission to correct its error on its own. That time is now running short.

Some may consider that Applicant's only remedy is on appeal. Once a permit application is heard and acted upon, the Applicant could choose to appeal, or not, and perhaps the Commission's action would stand unreviewed. What successful applicant would appeal its own permit? None likely would. Absent such an appeal, the uncertainty created by the



Commission's action would then continue to reverberate into the future, affecting other projects interested in doing business in South Dakota, not just the Applicant's.

Besides the legal considerations, there exist practical considerations from a docket that extends "indefinitely" beyond June 15, 2023, most of which have effects on landowners and communities, and which are worthy of consideration. The project can expect to work through the winter, with typical delays from doing so, as long as the ground is cleared prior to freeze up. For the information of all concerned, we have set forth below a list of potential issues that would arise if the hearing were delayed resulting in a 2024 shotgun construction start (assumed as April 1, 2024) versus splitting construction between 2023 and 2024.

- **Clearing Restrictions** – Increased challenge to clearing vegetation outside of the Migratory Bird Treaty Act ("MBTA") window (available clearing window is mid-July to end of February). Under the current construction plan starting construction in August 2023, the Applicant would be clearing non-agricultural land outside of the MBTA nesting window, allowing the project to have a more efficient construction schedule, and leading to a decreased duration of construction on landowners. If the Applicant instead faces a spring 2024 shotgun start, it would need to complete clearing activities in the middle of the winter and landowners would endure longer construction timeframes.
- **Construction** – Additional spreads will need to be added to complete construction in the single construction window, resulting in more personnel, trucks on roads, construction equipment, and traffic control issues across the state with construction in one season. In addition, with a 2024 shotgun start, some winter hydrotesting/commissioning will also be required. Due to the potential need to use non-freezing additives, the Applicant would need to haul off and dispose of millions of gallons of water as opposed to discharging back into existing watersheds after testing. Additionally, with more industry-wide pipeline construction scheduled for 2024, the Applicant will have fewer skilled workers to choose from for all disciplines for its project. Finally, the shorter construction window increases the Applicant's risk and exposure to force majeure delays.
- **Material Issues** – A spring 2024 shotgun start will result in materials (pipe, mats, valves, etc.) being on the ground for substantially longer periods of time before being installed, which, in turn, increases the risk of corrosion or damage to the material being installed on the pipeline.
- **Non-environmental Permits** – The Applicant will see increasing numbers many of its non-environmental permits expiring. This will result in the Applicant needing to renew those permits, which increases the burden on townships, counties, and other permitting entities.

- **Schedule and Tax Implications** – The overall schedule and in-service date of the project pushes anywhere from three (3) to six (6) months with a shotgun 2024 start, with a corresponding delay in permanent jobs, property tax dollars, and other beneficial impacts from the project.
- **Ethanol Plants / 45Z** – Being in service by the end of 2024 is vital for the ethanol plants to capture the full 45Z benefits where they would get more \$/ton of CO<sub>2</sub> sequestered.

Ultimately, Applicant respectfully requests that the hearing not be delayed in this matter. This project needs to proceed in a regulatory and construction sense. The hearings must be scheduled in time to conclude the docket by June 15, 2023.

Very truly yours,

MAY, ADAM, GERDES & THOMPSON LLP



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CC: HP22-001 Service List